

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

BY _____
ON _____
DEPUTY CLERK

THOMAS MCGOVERN,

Plaintiff,

v.

PATRICK SMITH, et al.

Defendant.

Cause No. CV-10-157-BLG-RFC-CSO

**ORDER ADOPTING FINDINGS
AND RECOMMENDATIONS OF
U.S. MAGISTRATE JUDGE**

United States Magistrate Judge Carolyn Ostby has entered Findings and Recommendation (*Doc. 5*) with respect to the 28 U.S.C. § 1915 and 28 U.S.C. § 1915A prescreening of McGovern's § 1983 Complaint (*Doc. 2*). Magistrate Judge Ostby recommends dismissal of Counts 1, 2, and 3, as well as Defendants Smith, Green, Noddlin, Zackmann, Tew, Bartle, and Berman/Thompson.

Upon service of a magistrate judge's findings and recommendation, a party has 14 days to file written objections. 28 U.S.C. § 636(b)(1). McGovern filed timely objections on February 14, 2011. *Doc.* 7. Accordingly, the Court must make a *de novo* determination of those portions of the Findings and Recommendations to which objection is made. 28 U.S.C. § 636(b)(1). For the

following reasons, McGovern's objections are overruled.

McGovern first objects to Magistrate Judge Ostby's conclusion that the prohibition on candles (1) did not substantially burdened the practice of his religion when electric candles are available, and (2) is rationally related to building safety. Regardless, Magistrate Ostby correctly held that candles raise fire safety concerns and are therefore properly restricted. *Rouser v. White*, 630 F.Supp.2d 1165, 1190 (E.D.Cal. 2009).

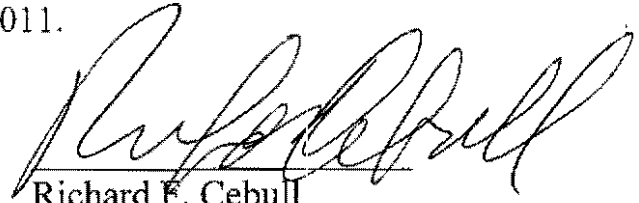
Although the Findings and Recommendation did not address the issue and it does not appear counsel has been formally requested, McGovern also objects to Magistrate Judge Ostby's failure to appoint counsel for him. In any event, while courts may appoint counsel under section 1915(d), they may only do so under "exceptional circumstances." *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). "A finding of exceptional circumstances requires an evaluation of both the likelihood of success on the merits and the ability of the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved." *Id.* (internal quotations omitted). This is not an exceptional circumstance. McGovern has sufficient ability to articulate his remaining claim.

After a de novo review, the Court determines the Findings and Recommendation of Magistrate Judge Ostby are well grounded in law and fact and

adopts them in their entirety.

Accordingly, **IT IS HEREBY ORDERED** that Claims 1, 2, and 3 are **DISMISSED**, as are Defendants Smith, Green, Noddlin, Zackmann, Tew, Bartle, and Berman/Thompson.

DATED this 7th day of March, 2011.


Richard F. Cebull
United States District Judge